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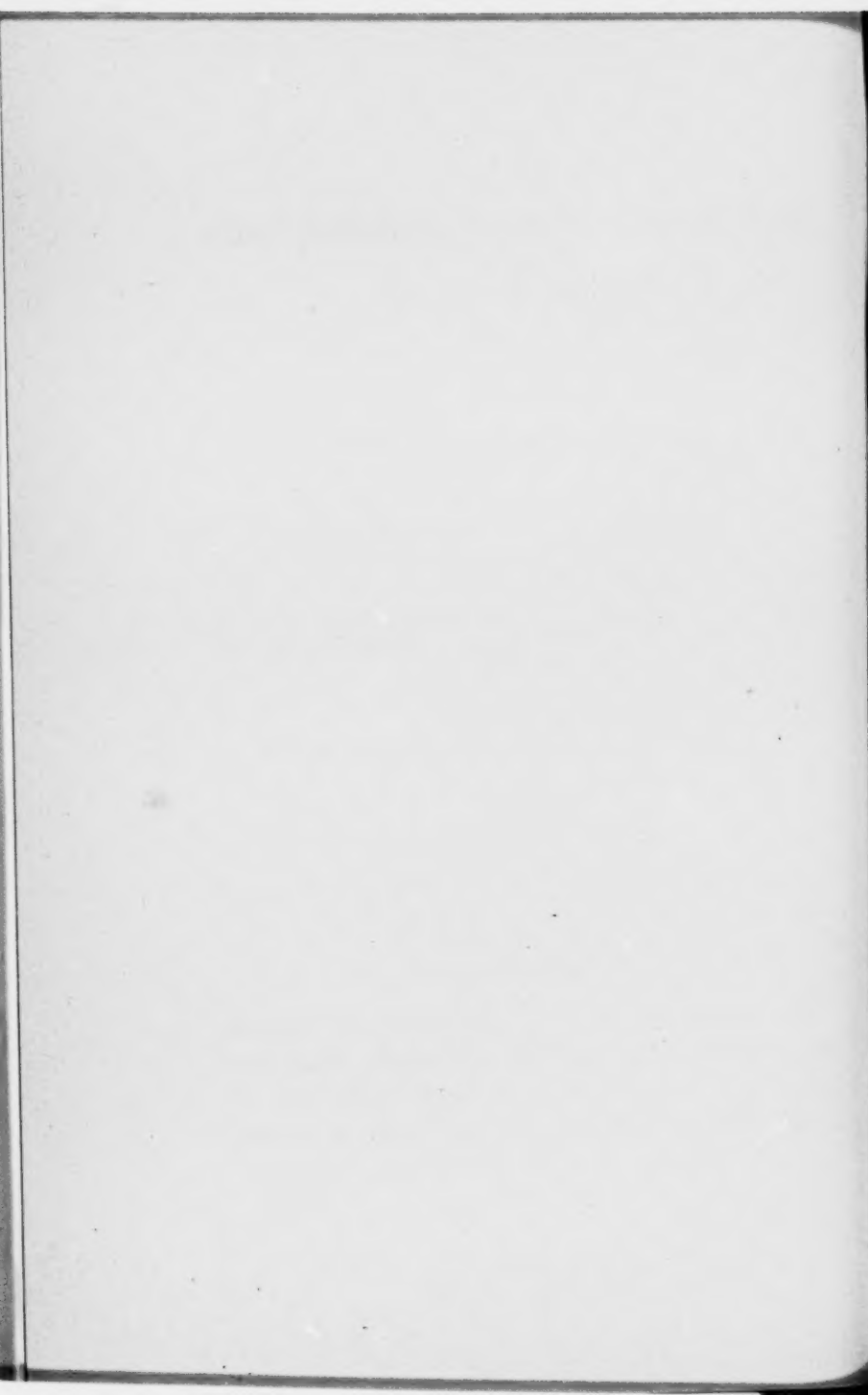
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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 989

MAX GELDZAHLER, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS FOR THE
FIFTH CIRCUIT*

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 330) has not yet been reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered April 5, 1944 (R. 331). The petition for a writ of certiorari was filed May 10, 1944. The jurisdiction of this Court is invoked

under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTION PRESENTED

Whether evidence showing that petitioner failed to declare (in his baggage declaration form or otherwise) diamonds concealed on his person although he disclosed the diamonds when searched by customs officials, is sufficient to sustain petitioner's conviction for smuggling.

STATUTES INVOLVED

The pertinent provisions of the Act of June 17, 1930, are printed in the Appendix, *infra*, pp. 9-10.

STATEMENT

Petitioner was indicted in the United States District Court for the Southern District of Florida on six counts charging violations of various sections of the customs law by the importation of 10,797 cut diamonds of an appraised value of \$28,014.00 (R. 1-8). The first count charged that, in violation of 19 U. S. C. 1593 (a), petitioner unlawfully, wilfully, and knowingly, with intent to defraud the revenue of the United States, smuggled into the United States from a foreign country diamonds which should have been but were not invoiced according to law (R. 1-2). The

second count charged that in violation of the same section petitioner, with intent to defraud the revenue, passed and attempted to pass through the customs a false, forged, and fraudulent document, to wit, a baggage declaration and entry form which purported to be a declaration of all articles purchased by petitioner abroad, but which in fact failed to list the diamonds (R. 2-3). The third count charged a violation of 19 U. S. C. 1593 (b) in that petitioner fraudulently and knowingly imported the diamonds from Cuba contrary to law without entering or declaring them on his baggage declaration form or otherwise (R. 3-4). The fifth count charged a violation of 19 U. S. C. 1591 in that petitioner attempted to introduce the imported diamonds into commerce by means of a fraudulent statement, to wit, his baggage declaration form in which he failed to declare the diamonds (R. 6-7). Petitioner was found guilty on these counts (R. 17)¹ and was sentenced to imprisonment for one year and a day and to pay a fine of \$1,000 on each count, the sentences to run concurrently and the payment of the fine on any one count to discharge the fines on the remaining counts (R. 17-19). On appeal, the judgment was affirmed *per curiam* (R. 331).

¹ The fourth and sixth counts, which were also laid under 19 U. S. C. 1591 (R. 4-6, 7-8), were dismissed at the close of the Government's case (R. 80).

The evidence for the Government may be summarized as follows:

Petitioner, a wholesale diamond merchant, arrived at Miami, Florida, on January 7, 1942, on a return trip from Havana, Cuba (R. 27, 55). He delivered to a customs inspector a baggage declaration and entry form which listed as articles purchased abroad, liquor, cigars, and cosmetics (R. 23, 27-28; Ex. 1, R. 26, 220-221). The inspector asked petitioner whether he had declared everything that he had acquired in a foreign country; and petitioner replied in the affirmative (R. 28).²

² The baggage declaration and entry form on its face contains the following printed statement (R. 220):

"I further declare that I have fully set forth herein all articles acquired abroad, used or unused, whether purchased or otherwise obtained, contained in my baggage or on my person or in the baggage of or on the persons named above accompanying me and all such articles not accompanying me for which free entry under the \$100 residents' exemption is to be claimed; *that none of the said articles is for sale, is being imported and declared as an accommodation to another, to be used in business, or was acquired otherwise than merely as an incident of my foreign journey, except as noted hereon, that the values as set forth represent the prices actually paid for articles purchased, or in the case of articles otherwise obtained, the fair value to the best of my knowledge and belief; that this declaration is made with the knowledge that failure to declare any article acquired abroad or any false statement in regard thereto will subject me to personal penalties and the articles involved to seizure.* I further declare that *I have not during the past 30 days received an exemption from duty such as is allowed a returning resident of the United States, except as follows:* * * *"
[Italics as in original.]

The inspector made a routine examination of petitioner's baggage and stamped the baggage to indicate that inspection had been completed (R. 28-29). Petitioner then proceeded to leave the customs enclosure and in so doing was required to pass the guard stationed at the exit (R. 40). The guard noticed a bulge in petitioner's breast pocket and asked him to produce the contents. Petitioner took out some papers and 13 cigars. In response to a question by the guard, he admitted that the cigars had not been declared. (R. 40.) When asked whether he had anything else on his person which he had not declared, he made no answer. The guard then started to search petitioner's left pocket and, as he did so, petitioner took from his right trouser pocket a package which he said contained diamonds. (R. 40-41.) In response to questioning by the guard, petitioner stated that the diamonds had not been declared and that he had paid about \$10,000 for them (R. 41). Petitioner was subsequently taken to the office of a special agent and there, in the presence of several customs officers, the package which he had handed to the guard was opened and found to contain diamonds enclosed in 2 cylindrical rubber tubes (R. 41, 49-50, 54). Petitioner told the customs officials at that time that he had purchased the diamonds in Cuba from a man named Jack or Jacques for \$14,600 (R. 55, 60-61).

ARGUMENT

Since the prison sentences imposed upon petitioner are to run concurrently, and on payment of the fine imposed on any count the fines on the other counts are to be remitted, the judgment must be sustained if the conviction is proper as to any one count. *Hirabayashi v. United States*, 320 U. S. 81, 85, 105; *Whitfield v. Ohio*, 297 U. S. 431, 438; *Brooks v. United States*, 267 U. S. 432, 441; *Pierce v. United States*, 252 U. S. 239, 252-253; *Abrams v. United States*, 250 U. S. 616, 619.

As to the first count, charging smuggling in violation of 19 U. S. C. 1593 (a), the facts of this case bring it squarely within the ruling of this Court in *United States v. Ritterman*, 273 U. S. 261, where a conviction under an earlier equivalent statute was sustained although the defendant in that case admitted while his person was being searched that he had concealed diamonds in his baggage. The Court there stated (p. 269): "He could not purge himself of the consequences of his fraud by confessing when he saw that he was on the point of being discovered or, as might have been found, after he had been."³ See also *New-*

³ In the *Ritterman* case the Court distinguished the earlier decision in *Keck v. United States*, 172 U. S. 434, upon which petitioner relies (Pet. 6), on the ground that the goods involved in that case had not yet been landed. Here, however, as in the *Ritterman* case, the goods "were clandestinely introduced upon the soil of the United States" (273 U. S., at 268).

man v. United States, 276 Fed. 798 (C. C. A. 2), certiorari denied, 258 U. S. 623. Contrary to petitioner's contention (Pet. 5-6; see also Pet. 4), the discovery of the diamonds in this case was as much the result of a search by customs officials as was the discovery in the *Ritterman* case. The testimony establishes (*supra*, pp. 4-5) that petitioner did not disclose the package until the guard had started to search his person. If there were any doubt from the testimony as to whether this disclosure was made at a time when petitioner knew that he was on the point of being discovered, within the rule of the *Ritterman* case, that doubt was resolved by the verdict of the jury, for the trial judge in his charge specifically instructed the jury that an incoming passenger who had not declared merchandise might voluntarily change his mind before completing passage through the customs and would thereby purge himself of wrongdoing, but that he could not purge himself of such unlawful purpose by confessing when he was at the point of being discovered (R. 211).⁴

⁴In the light of this charge it is clear that the case does not present the question which petitioner seeks to raise as to counts 2, 3, and 5 (Pet. 2); that is, whether a baggage declaration which does not disclose merchandise brought in from abroad is a false or fraudulent document if such merchandise is voluntarily offered for inspection. For the jury found in effect that there was no voluntary disclosure of the diamonds. Nor does the case present the other question sought to be raised by petitioner as to those counts (Pet. 2, 4); i. e., whether a baggage declaration and entry form is

Here, as in the *Ritterman* case, the jury found that "repentance came too late."

CONCLUSION

The decision below is correct, and the case presents no conflict of decisions nor any question of general importance. We respectfully submit, therefore, that the petition for a writ of certiorari should be denied.

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MAY 1944.

the exclusive means of declaring articles subject to duty. The trial judge did not charge that the baggage declaration form was the exclusive method of declaring merchandise, but stated merely that petitioner was entitled so to declare the diamonds but that if he did not do so he was under a duty to make legal declaration of his possession in some other manner (R. 211). Moreover, as to count 2, the judge charged the jury that although petitioner "could have made a separate entry of the merchandise, the gist of this count is that the defendant did make out and use this particular form, No. 6063, as a complete declaration of his dutiable merchandise and that he thereby defrauded the United States revenue * * *." (R. 204).

